BANK PERTANIAN MALAYSIA BHD v. GAGNAR CORPORATION SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
LEE SWEE SENG JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: W-02(IM)(MUA)-77-01-2020]
12 JULY 2021

CIVIL PROCEDURE: *Proceedings – Re-amendment to defence and counterclaim – Appeal against – Preliminary objection raised – Whether order allowing re-amendment appealable – Whether order allowing re-amendment 'ruling made in course of trial' – Whether application to re-amend made during trial and before completion of trial – Whether decision disposed of rights of parties – Whether appeal incompetent in limine and ought to be struck off*

The appellant brought an action against the respondents to recover monies due and owing under an *al-bai bithaman ajil* facility granted by the appellant to the first respondent ('BBA facility'). The remaining respondents were sued as guarantors under the BBA facility. On 22 October 2015, the respondents filed their defence and counterclaim and subsequently, on 23 December 2015, the respondents amended their defence and counterclaim ('first amendment'). During case management on 7 July 2017, the respondents indicated that there may be a need to re-amend their amended defence and counterclaim after the expert produced a full report on the validity of the BBA facility. On 28 July 2017, both parties filed their respective expert reports. On 4 August 2017, the respondents filed an application to re-amend the amended defence and counterclaim (encl. 52). On 11 September 2017, the High Court allowed encl. 52. The re-amendments became the respondents' re-amended defence and counterclaim ('second amendment'). Trial then commenced and the appellant closed its case on 5 September 2019. On 22 October 2019 and 23 October 2019, the respondents called two witnesses, DW1 and DW2. On 23 October 2019, *ie,* the 34th day of trial, the appellant took objection to an answer given by DW2. The appellant objected to DW2's evidence that the financing agreements for the BBA facility were signed 'something towards the end of April 2011'. On 4 November 2019, the respondents filed the re-amendment application (encl. 188) and the re-amendment application was heard on 9 December 2019 and the decision was reserved ('third amendment'). On 13 December 2019, the trial judge allowed the re-amendment application. The appellant appealed. The respondents raised a preliminary objection that the High Court order allowing the re-amendment of defence and counterclaim was non-appealable, and that the appellant's appeal was incompetent *in limine.*

Held (striking out appeal)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The re-amendment application was heard on 9 December 2019 and, on 13 December 2019, the re-amendment application was allowed before continuation of trial on 13 December 2019. The continuation of the trial was scheduled on 13 December 2019 but vacated after the re-amendment application was allowed on the same day. The action was then fixed for case management on 15 January 2020. The trial at the High Court was yet to be completed, hence the High Court did not finally dispose of the rights of the parties. (para 33)

(2) The sealed order clearly showed that the order dated 13 December 2019 was made pursuant to a hearing in chambers made by the respondents under a notice of application. The re-amendment application was an interlocutory application, which was heard and ordered in chambers under O. 32 r. 11 of the Rules of Court 2012. Be that as it may, the events showed that the respondent's application was made during the trial and before the completion of trial and therefore, the order of the High Court dated 13 December 2019, was a 'ruling made in the course of a trial'. (para 34)

(3) This court was bound by the principle of *stare decisis* in the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* that an appeal does not lie against a decision in an amendment application made in the course of a trial when such a decision does not finally dispose of the rights of the parties. The High Court order dated 13 December 2019 was thus non-appealable. The appeal was incompetent *in limine* and ought to be struck off. The respondents' preliminary objection was allowed. (paras 35 & 36)

(4) The impugned amendments did not create new or additional defence which made it difficult for the appellant to pursue their claim or that they did not result in the appellant being prejudiced. The issue of delay on the part of the respondents in making the application to amend, which was raised by the appellant, ought not to be a factor to dismiss the application to amend. The trial judge had exercised her discretion based on the correct principles of law and there was no miscarriage of justice. Thus, there was no need or justification for appellate interference by this court. (paras 57 & 60)

Case(s) referred to:

Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor [2009] 1 LNS 233 CA ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(foll)***

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 HC ***(refd)***

Cassell And Co Ltd v. Broome [1972] AC 1027 ***(refd)***

Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2016] 4 CLJ 831 CA ***(refd)***
Cropper v. Smith [1983] 26 CHD 700 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***
ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd [2019] 4 CLJ 131 FC ***(refd)***
Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syek Kechik Syed Mohamed & Anor And Other Appeals [2000] 3 CLJ 797 CA ***(refd)***
Merlimau Pegoh Ltd v. Collector Of Land Revenue Jasin [1969] 1 LNS 108 HC ***(refd)***
Mulpha International Bhd & Ors v. Mula Holdings Sdn Bhd & Ors And Other Appeals [2017] 1 LNS 622 CA ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Sitrac Corporation Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463 HC ***(refd)***
Suhaili Ismail v. Syarikat Sribima Sdn Bhd [2015] 1 LNS 719 CA ***(refd)***
Teo Kim Lian Jenny v. Draland Sdn Bhd [2000] MLJU 740 ***(refd)***
The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 67(1), 68(1)
Rules of Court 2012, O. 32 r. 11
Rules of the High Court 1980, O. 20 rr. 5, 8

For the appellant - Andrew Chiew Ean Vooi & Wong Han Wey; M/s Lee Hishammuddin Allen & Gledhill
For the respondents - Nasema Jalaludheen & Rachel See Aimay; M/s Cheah Teh & Su

[Editor's note: For the High Court judgment, please see Bank Pertanian Malaysia Bhd v. Gagnar Corporation Sdn Bhd & Ors [2020] 1 LNS 2391 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] This is the appellant's/plaintiff's appeal against the High Court's order dated 13 December 2019 which allowed the respondents/defendants to amend its re-amended defence and counterclaim.

[2] The respondents raise a preliminary objection that the High Court order allowing the re-amendment of defence and counterclaim is non-appealable, and the appellant's appeal is incompetent *in limine*.

[3] For purpose of the appeal we directed the parties to submit both on the preliminary objection and also the merits of the appeal.

[4] Having heard the submissions oral and written, we unanimously allowed the respondent's preliminary objection and struck off the appeal with costs of RM5,000 subject to allocator fee.

[5] Since we have allowed the respondents' preliminary objection and the appeal is struck out there is no appeal before us. Even if the preliminary objection is not sustainable and had the appeal proceeded, we find there is no merit in the appeal and it ought to be dismissed.

Background Facts

[6] On 13 August 2015, the appellant brought this action against the respondents to recover monies due and owing under an *al-bai bithaman ajil* facility granted by the appellant to the first respondent ("BBA facility"). The remaining respondents were sued as guarantors under the BBA facility.

[7] On 22 October 2015, the respondents filed their defence and counterclaim. On 23 December 2015, the respondents amended their defence and counterclaim ("first amendment").

[8] On 1 March 2016, the appellant filed an application for summary judgment against the respondents ("encl. 17"). To oppose encl. 17, the respondents produced an expert report prepared by Dr Hakimah Yaacob expressing a preliminary finding that the BBA facility was not Shariah compliant ("preliminary report").

[9] The appellant later withdrew encl. 17. Parties proceeded with pre-trial case management.

[10] During case management on 7 July 2017, the respondents' counsel indicated that there may be a need to re-amend their amended defence and counterclaim after their expert produce a full report on the validity of the BBA facility. Parties were directed to file their respective expert reports on the validity of the BBA facility.

[11] On 28 July 2017, both parties filed their respective expert reports.

[12] On 4 August 2017, the respondents filed an application to re-amend the amended defence and counterclaim ("encl. 52").

[13] On 11 September 2017, the High Court allowed encl. 52. The re-amendments become the respondents' re-amended defence and counterclaim ("second amendment").

[14] Trial commenced on 22 November 2017.

[15] The appellant closed its case on 5 September 2019.

[16] On 22 October 2019 and 23 October 2019, the respondents called two witnesses, ie, Dr Hakimah Yaakob (DW1) and Hamidah binti Osman ("DW2").

[17] On 23 October 2019, ie, 34th day of trial, the appellant took objection to an answer given by DW2. The appellant objected to DW2's evidence that the financing agreements for the BBA facility were signed "something toward the end of April 2011". The court adjourned the trial and a new trial dates were fixed on 11 December 2019 to 13 December 2019.

[18] On 4 November 2019, the respondents filed the re-amendment application (encl. 188). The re-amendment application was heard on 9 December 2019 and the decision was reserved (third amendment).

[19] On 13 December 2019, the learned judge allowed the re-amendment application. The trial scheduled on 13 December 2019 was vacated. A case management was fixed on 15 January 2020.

[20] On 10 January 2020, the appellant appealed.

Preliminary Objection

[21] The respondents' preliminary objection is premised on the decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153. At the High Court the court allowed the appellant's application to amend its re-amended statement of claim to add a claim for special damages during midstream of the trial wherein six witnesses out of eight had already testified. The respondents appealed against the said High Court's decision and the appeal was allowed by the Court of Appeal. The Federal Court was called upon to determine whether the order made by the High Court in allowing the appellant's amendment application was appealable.

[22] In allowing the appeal and setting aside the decision of the Court of Appeal, the Federal Court speaking through His Lordship Idrus Harun FCJ held that:

> ... the High Court's decision to allow the amendment application was not appealable to the Court of Appeal. The appeal was incompetent *in limine* and, as such, could not be laid before the Court of Appeal as it was clearly precluded by the law ...

[23] His Lordship Idrus Harun FCJ (as he then was) in delivering the majority judgment of the Federal Court *inter alia* held that:

> [61] Accordingly, I have no difficulty in holding that the present position in the law clearly shows that an appeal does not lie against a decision in an amendment application made in the course of trial as is in this instant action, and moreover, such a decision does not finally dispose of the rights of the parties. There is in my judgment no basis in the respondents' contention that the High Court's decision is appealable as it is a ruling made in the course of hearing the interlocutory application but rather a decision made at the conclusion of the hearing of the said application on its merits. Yet to my mind, the respondents have obviously misconstrued

A the definition of 'decision' in s. 3 in the context of s. 67 of the Act. What characterises as being a decision as being appealable or otherwise is not only confined to a question of whether a ruling has disposed of the final rights of the parties but also whether it is a decision made in the course of a trial or matter. Therefore, it matters not if the decision is made at the conclusion of the interlocutory application. The plain fact is that such
B interlocutory application was indisputably made and heard in the course of the trial of the instant suit. It was decided before the High Court delivered its judgment on liability.

[24] His Lordship Azahar Mohamed CJ (Malaya) in concurring with the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd* (*supra*) referred to the Federal Court's decision *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd* [2019] 4 CLJ 131 and held amongst others that:

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> [76] The Federal Court in *Kempadang* further held that the definition of s. 3 acts as an additional exclusion of the types of matters that cannot
> D be appealed against. The Federal Court's opinion on this, which I accept as a correct statement of law, reads as follows:
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> > [26] Civil matters which are not appealable to the Court of Appeal are listed in sub-section 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a
> > E judgment or order, which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of section 3 of the CJA when it qualifies the word "decision" as opposed to "ruling" of the court.
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> [77] The decision is a clear authority to support the proposition that
> F s. 67(1) read with s. 3 and s. 68(1) CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties. Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of "decision" in s. 3 CJA and thereby appeal against every decision of trial court, which would
> G indisputably delay the administration of justice.

[25] In addition, His Lordship held at para. 79 that:

> The present position in the law holds that an appeal does not lie against a decision in an amendment application made in the course of a trial and, further, such a decision does not finally dispose of the rights of the
> H parties.

[26] The respondents also relied on the Court of Appeal case in *Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party)* [2016] 4 CLJ 831; [2016] 4 MLJ 100. The issue in this case was whether the Sessions Court's dismissal of the application by the appellant to amend his statement of claim
I midway through trial was a "decision" within the meaning of s. 3 of the Courts of Judicature Act 1964 ("CJA") that could be appealed against. The

appellant sued the respondents in the Sessions Court for damages arising from a road accident. After a witness had testified and the trial was adjourned to another date, the appellant filed an application to amend his writ and statement of claim to include an additional claim for "cost of professional care". The trial court dismissed the said application. On appeal to the High Court, the High Court sustained a preliminary objection by the respondents and the third party that the trial court's ruling was not a "decision" under s. 3 of the CJA which could be appealed against as it was "made in the course of a trial or hearing and did not have the effect of finally disposing the rights of the parties". The appellant argued that an application to amend pleadings was not caught by s. 3 of the CJA as the Rules of Court 2012 allowed such an application to be made at any stage of the proceedings including after trial but before judgment was handed down.

[27] In dismissing the appeal, this Honourable Court *inter alia* held that:

> (2) There was no doubt that a decision on an application to amend the writ of summons and statement of claim was one made during the course of trial which did not finally dispose of the rights of the parties and, therefore, was not a decision within the meaning of s. 3 of the CJA. To concede to the contention that the instant appeal was appealable was to give a party an extra bullet, so to speak, to delay an expeditious trial and this was inconsistent with the jurisprudence of the present regime of civil procedure.

[28] On the present facts, the respondents submitted that the High Court order is a decision made during the course of trial as encl. 188 was filed on 14 November 2019 after DW2, had testified on 23 October 2019 and the trial was adjourned to another date. The High Court Judge heard the re-amendment application in encl. 188 on 9 December 2019 and allowed encl. 188 on 13 December 2019 when the trial at the High Court has yet to be completed. Since the trial at the High Court has yet to be completed, the High Court could not be said to have finally disposed of the right of the parties following the decisions in *Asia Pacific Higher Learning Sdn Bhd* (*supra*) and *Christopher Bandi* (*supra*). The respondents submitted that the High Court order is certainly not appealable.

[29] The appellant argued that the present definition of "decision" came into effect following an insertion pursuant to the Courts of Judicature (Amendment) Act 1998. The 1998 Act did not however define what "ruling" was. The words "ruling made in the course of a trial" refer to rulings when the court is hearing the action brought under the writ of summons. Further, the meaning of "decision" under s. 3 should be read separately with s. 67(1) of the CJA.

[30] The appellant relied on the dissenting judgment by David Wong Dak Wah (CJSS as he was then) in *Asia Pacific Higher Learning Sdn Bhd* (*supra*) which held that s. 67(1) clearly does not include the word "decision". Further, since s. 68 already limits civil matters that could not be appealed, His Lordship held there was no reason to further limit the jurisdiction of the Court of Appeal under s. 67(1) by reference to the definition of "decision" under s. 3.

[31] Whether, in the present case, the order dated 13 December 2019 was a "ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties, some case laws and authorities including Parliament Hansard were cited by the appellant on the definition of the words "ruling", "decision" and "trial" (see *Teo Kim Lian Jenny v. Draland Sdn Bhd* [2000] MLJU 740; *Mulpha International Bhd & Ors v. Mula Holdings Sdn Bhd & Ors And Other Appeals* [2017] 1 LNS 622; [2017] MLJU 445; *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; [2010] 6 MLJ 585; *Sitrac Corporation Sdn Bhd v. Lim Siew Eng* [2002] 4 CLJ 463; *Merlimau Pegoh Ltd v. Collector Of Land Revenue Jasin* [1969] 1 LNS 108; [1969] 2 MLJ 248; and *Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syek Kechik Syed Mohamed & Anor And Other Appeals* [2000] 3 CLJ 797). By interpretation of the words "decision", the appellant submitted that the order dated 13 December 2019 is appealable.

[32] In our view, such arguments have been canvassed in *Asia Pacific Higher Learning Sdn Bhd* (*supra*). The appellant is relying on the minority decision (dissenting judgment) and concluded the High Court's decision was not made in the course of trial. In contrast, the majority judgment held that s. 67(1) read with s. 3 and s. 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties otherwise, appeals against every decision of trial court, would indisputably delay the administration of justice.

[33] In our considered view, the argument by the appellant that the order dated 13 December 2019 is not a "ruling made in the course of a trial" is misplaced. The re-amendment application was heard on 9 December 2019 and on 13 December 2019, the re-amendment application was allowed before continuation of trial on 13 December 2019. The continuation of the trial was scheduled on 13 December 2019 but vacated after the re-amendment application was allowed on the same day. The action was then fixed for case management on 15 January 2020. In any event the trial at the High Court has yet to be completed, hence the High Court does not finally dispose of the right of the parties.

[34] It was also argued that the sealed order clearly shows the order dated 13 December 2019 was made pursuant to a hearing in chambers made by the respondents under a notice of application. The re-amendment application

was an interlocutory application, which was heard and ordered in chambers under O. 32 r. 11 of the Rules of Court 2012. Be that as it may, the events show that the respondents' application was made during the trial and before the completion of trial therefore, the order of the High Court dated 13 December 2019 is a "ruling made in the course of a trial". A

[35] On the same facts and circumstances, this court is bound by the principle of *stare decisis* in the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd* (*supra*) that an appeal does not lie against a decision in an amendment application made in the course of a trial when such a decision does not finally dispose of the rights of the parties. The Federal Court decision in *The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 already sets out the principle succinctly that in the hierarchical system of courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers (see the remarks of Lord Hailsham in *Cassell and Co Ltd v. Broome* [1972] AC 1027 at p. 1054 D and E). B C D

[36] In the circumstances, we allow the preliminary objection raised by the respondents that High Court order dated 13 December 2019 is non-appealable. The appeal is incompetent *in limine* and ought to be struck off.

[37] For the sake of completeness, we give our view on the said High Court order dated 13 December 2019. E

[38] The appellant's appeal is confined to the amendments in paras. 13 and 14(b)(i) and (i)(A) of the re-amended defence and counterclaim (the "impugned amendments"). Those amendments, are set out below. F

> 13. The first defendant (by original action) admits having executed instruments under the financing facility pleaded in paragraph 6 of the Statement of Claim ("the Financing Facility) *sometime towards the end of April 2011* but the Financing Facility was and nor in accordance with the Islamic principles of *Bai al-Inah Al-Bai Bithaman Ajil* ("BBA") and/or Shariah and/or any lawful Islamic principles. G
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> 14. The first defendant (by original action) avers that the Financing Facility and/or the principal financing documents referred to in paragraphs 9(a) and 9(b) of the Statement of Claim (ie, the asset purchase agreement and the asset sale agreement) are in contravention of *inter alia* section 59(2) of the Central Bank of Malaysia Act 2009 and section 13A of the Islamic Banking Act 1983, *are tainted with illegality, void (bathil) in Shariah and are unenforceable in law*. H
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> Particulars ...
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> (b)(c) the nature and/or the manner of execution of the asset purchase agreement and/or the asset sale agreement are in contravention of the written circulars, guidelines and/or notices issued by Bank I

Negara of Malaysia and/or the advice of the Shariah Advisory Council's resolting including the Resolutions dated of 8 July 1997, 12 December 1998, 11 November 200 and 17 February 2009 *inter alia* in the following manner:

(i) *There is no record of the execution of the asset purchase agreement and the asset sale agreement and the asset sale agreement is are in contravention of the Shariah requirement that the second transaction should not be executed simultaneously and/or together with the first transaction*. The sequence is incorrect as the asset purchase agreement was not completely executed before the conclusion of the asset sale agreement;

(i)(A) Both the asset purchase agreement and the asset sale agreement were not concluded at different times.

(emphasis added)

[39] The appellant submitted that the impugned amendments allow the respondents to raise a different and new defence after the close of the appellant's case. The other complaint is that the impugned amendments were made after the 34th day of trial without any explanation for delay. The court should not have allowed a late amendment without any cogent reasons for the delay. The amendments were sought after the plaintiff had closed its case. The impugned amendments had prejudiced the appellant.

[40] We heard the submissions on the grounds raised by the appellant. We have read the grounds of judgment of the learned judge. With the same objections raised against the impugned amendments before us and at the court below, we find all the objections raised by the appellant have been considered by the learned judge. From her judgment, we are satisfied that in exercising her discretion to allow the impugned amendments, she had given her reasons for allowing the impugned amendments and had correctly followed the established law applicable to amendment to pleading.

[41] As correctly held by the learned judge, the application for amendment was made under O. 20 r. 5 and r. 8 of the Rules of the High Court 1980 which give the power of the court to any stage of proceeding to allow any party to amend his pleading.

[42] Further, to ensure that neither party in the adversarial system is taken by surprise or unfairly prejudiced in any proposed amendments made by a party to the proceeding and in exercising the discretion, the court will be guided by the principles of law expounded in the decided cases relating to amendments (see *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825). Further, in *Suhaili Ismail v. Syarikat Sribima Sdn Bhd* [2015] 1 LNS 719; [2015] 6 MLJ 556, which held that the rule that amendments to pleadings could be sought at any stage of the proceeding after the close of pleadings. The Federal Court in *Hong Leong Finance Bhd v. Low*

Thiam Hoe & Another Appeal [2015] 8 CLJ 1; [2016] 1 MLJ 301 (FC), held that an applicant in such a situation bears the onus to justify the late application for amendment to the pleadings and that the applicant must show the strength of the new case.

[43] The appellant had objected to the insertion of the words "sometimes towards the end of April 2011" in para. 13 of the impugned amendments. The appellant's case is that the insertion of such words has the effect of introducing a new allegation that the BBA financing documents were executed by the respondents in or around end April 2011. Thus the amendment introduces a new challenge on the date of execution of the BBA financing documents.

[44] Having heard the submissions, the learned judge held that para. 13 of the impugned amendments is not a new challenge on grounds that there is clear evidence through PW1 before the court that the BBA financing documents had already been executed by the respondents before the appellant executed the same. The court cannot disregard material facts which is relevant to assist the court to determine whether execution of the asset purchase agreement and asset sale agreement are in contravention of Syariah principles which is already pleaded in para. 14(c)(i) of the re-amended defence. According to her, dismissing the respondents' para. 13 of the impugned amendments would not do justice to the case. Further, despite that it was made after the appellant had closed their case and after they had signed the financing documents on 4 May 2011 that does not mean the execution of the financing documents on 4 May 2011 are in compliance with the requirements of Syariah principles/Syariah Advisory Council resolution.

[45] The appellant also objected to para. 14(b)(i) and (i)(A) of the impugned amendments being a new defence because the initial challenge is that there was no record of time of execution to both the asset purchase agreement and asset sale agreement and that the transaction should not be executed simultaneously. According to the appellant, it cannot be expected to take sequential completion, as part of the respondents' defence, when it is not specifically pleaded, especially since it involves technical issues of whether the BBA facility was Syariah compliant. More importantly, the court should likewise only consider whether the first transaction has been completed if sequential completion was specifically pleaded.

[46] The learned judge had considered the appellant's objection. Firstly, she considered para. 14(c) of the re-amended defence where it is pleaded that the execution of the asset purchase agreement and asset sale agreement are in contravention of the Syariah requirement in that the second transaction (asset sale agreement) should be executed simultaneously and/or together with the first transaction (asset purchase agreement). Based on para. 14(c) (the original text) it is pleaded that such contravention is premised on the absence

of the recording of when both the agreements were executed. The recording when both the BBA financing documents were executed would facilitate the determination whether the execution of the asset purchase agreement and asset sale agreement is in sequence as required under the Syariah principles. So the issue is and has always been sequence of the execution of both the said agreements.

[47] In relation to para. 14(b)(i) and 14(b)(i)(A) of the impugned amendments, the learned judge opined that the issue on sequence is further expanded and clarified in that the asset purchase agreement was not completely executed before the asset sale agreement was concluded. Paragraph 14(b)(i)(A) is consistent with PW1's evidence that the asset purchase agreement and asset sale agreement had already been executed by the respondents before they signed the same on 4 May 2011. The learned judge formed her view that the issue of the sequence of execution of both agreements remains unchanged. The learned judge held that para. 14(b)(i) and 14(i)(b) A do not change the asset purchase agreement and asset sale agreement were in contravention of the Syariah principles on the ground that the execution of the same were not transacted in the sequence as required by the Syariah principles.

[48] In relation to para. 14(b)(ii) of the impugned amendments, the learned judge considered the objections raised by the appellant and found that upon her reading of para. 14(b)(ii) of the impugned amendments and para. 14(c)(iv) of the re-amended defence, she found that there is nothing to suggest that para. 14(b)(ii) introduces a new challenge to the issue of inter-conditionality and/or that it has changed the respondents' defence which caused prejudice to the appellant. She held that the objection is without merit.

[49] Finally on the issue of delay on the part of the respondents in making the application to amend, the appellant contended that it could have been made in the second amendment in 2017 and further contended that the respondents failed to provide cogent and reasonable explanation to justify the delay. Before us, the appellant submitted that the learned judge has agreed and accepted the fact that the respondents' affidavits did not show the issue of delay and the explanation thereto is not mentioned at all.

[50] We agree with the appellant and that contention is found at para. 46 of the grounds of judgment. Be that as it may, the learned judge has given her explanation and reason for rejecting the appellant's objection despite the fact that there was delay on the part of the respondents.

[51] At para. 47 of her judgment, the learned judge said as follows:

> [47] Despite the late Application to amend, the issues on sequence (*ex parte* execution of the BBA Financing Documents in particular the asset purchase agreement and asset sale agreement simultaneously and

inter-conditionality (stipulation to repurchase the Assets) has been raised and presented during the trial through the plaintiff's witnesses (PW1) the bank officer of the plaintiff who signed both the Agreement and PW5 (the plaintiff's expert witness) and the defendants' expert witness (DW1).

[52] The learned judge explained her decision in her illustration relating to the evidence of PW5 and PW1 at paras. 48 to 57 of the judgment. Her finding is at para. 60 when the learned judge held as follows:

[60] In the instant case, the defendants may have erred for not making the Application to amend during the Second Amendment but taking into account what had transpired in this case this court is of the view the defendants ought not to be punished for their mistake. To do so by not allowing the Proposed Amendments would deprive this court from adjudicating constructively the issues for purpose of determining the real question in controversy and the rights of the parties.

[53] In support of her view, she referred to *Cropper v. Smith* [1983] 26 CHD 700 which held that it is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Also in *Hong Leong Finance* (*supra*) one of the criteria to be considered when dealing with late application for amendment is that the proposed amendments must disclose full particulars in order to enable the court to ascertain if there is a real prospect of success in proving the same.

[54] The learned judge was of the view that para. 13 of the impugned amendment which deals with *ex parte* execution of the asset purchase agreement and asset sale agreement by the respondents read together with para. 14(b)(i) and 14(b)(i)(A) and para. 14(b)(ii) and relevant particulars ought not to be disregarded in order to ascertain not only the success of the respondents' case but also that of the appellant. She held that although there is delay on the part of the respondents in making the application to amend it does not prejudice the appellant as the issues in the impugned amendment are not entirely new issues which are distinct from the respondents' pleaded case in the re-amended defence.

[55] In our view, be that as it may, delay *per se* does not equal prejudice or injustice (see *Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor* [2009] 1 LNS 233; [2009] 4 MLJ 833). In *Alloy Consolidated Sdn Bhd* (*supra*), the appellants appealed against High Court's decision in allowing the first and second respondents' application to amend their respective statement of defence to include the counterclaim. Both appeals were dismissed by the Court of Appeal with costs. In determining the issue of delay, the Court of Appeal *inter alia* held that:

On the issue of delay, suffice to say that delay *per se* did not equal prejudice or injustice. In fact, the proposed amendment was applied for to reflect the first respondent's true case against the appellants. As such

A the application to amend was not made *mala fide*. If the amendment was allowed the appellants would suffer no prejudice or harm that cannot be compensated by costs but if the amendment was not allowed then the first respondent would forever be shut out from receiving justice. Therefore the amendment should be allowed and the High Court Judge had not erred in making an order to that effect.

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[56] We agree with the learned judge. In fact, the amendments are necessary for the purposes of determining the real question in controversy between the parties (see *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230).

C **[57]** Having read the grounds of judgment, we are satisfied that the learned judge has made the right decision. We agree with her finding which concluded that the impugned amendments do not create new or additional defence which makes it difficult for the appellant to pursue their claim or that they do not result in the appellant being prejudiced. We also agree with her
D that the issue of delay raised by the appellant, the reason ought not to be the factor to dismiss the application to amend. We find that there is no error or mistake in her exercise of discretion to allow the impugned amendment.

[58] It is trite law as well that the appellate court will not ordinarily interfere with the exercise of discretion of the trial court in relation to
E procedural and/or interlocutory matters (see *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35).

[59] In dismissing the appeal with costs, Lord Guest in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 amongst others held that:

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> *The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (Charles Osenton & Co v. Johnston [1942] AC 130 per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in*
> G *a contrary way or that there has been a miscarriage of justice (Evans v. Bartlam [1937] AC 473.* (emphasis added)

[60] Guided by *ECM Libra Investment Bank Bhd* (*supra*) and *Ratnam* (*supra*), we hold that the learned judge has exercised her discretion based on correct principles of law and there is no miscarriage of justice. Thus, there is no need
H or justification for appellate interference by this court.

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